SUPREME COURT
MAY 2002
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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(JUDGES SAAD, WHITE, AND HOEKSTRA)
AND THE WORKER'S COMPENSATION APPELLATE COMMISSION

JACK D. HILL, Deceased,
By EDWARD F. HILL,
Personal Representative,

Plaintiff-Appellee,

S.C. No: 119363

C.A. No: 221335

L.C. No: WCAC 98-000144

and
AUTOMOBILE CLUB OF MICHIGAN,

Intervening Plaintiff-Appellee,

v

FAIRCLOTH MANUFACTURING COMPANY
and ACCIDENT FUND COMPANY,

Defendants-Appellants.
_____/

EVANS, PLETKOVIC & RHODES
BY: JANE S. COLOMBO P31361
Attorneys for Intervening Plaintiff-Appellee

LACEY & JONES
BY: GERALD M. MARCINKOSKI P32165
Attorneys for Defendants-Appellants
_____/

DEFENDANTS-APPELLANTS' REPLY BRIEF

SUBMITTED BY:

LACEY & JONES
By: Gerald M. Marcinkoski P32165
Attorneys for Defendants-Appellants
600 South Adams Road, Suite 300
Birmingham, MI 48009
(248) 433-1414

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STATEMENT OF ISSUE

DOES THE "ARISING OUT OF" INQUIRY GO DEEPER IN CONSEQUENTIAL INJURY CASES THAN THAT ADVOCATED BY PLAINTIFFS? ON ANOTHER POINT, IS THE "ACCIDENTAL" PERSONAL INJURY REQUIREMENT DISCUSSION OF PLAINTIFF-FRAZZINI IRRELEVANT?

STATEMENT OF FACTS

(Numbers in parentheses refer to the pages of Appellants' Appendix, unless otherwise indicated).

Defendants incorporate the Statement of Facts contained in its brief on appeal already on file with the Court. This brief replies to the briefs filed by the plaintiff in this case and by the plaintiffs in the companion case, *Frazzini and AAA of Michigan v Total Petroleum, Inc.*

ARGUMENT

THE "ARISING OUT OF" INQUIRY GOES DEEPER IN CONSEQUENTIAL INJURY CASES THAN THAT ADVOCATED BY INTERVENING PLANTIFFS. ON ANOTHER POINT, THE "ACCIDENTAL" PERSONAL INJURY DISCUSSION BY PLAINTIFF-FRAZZINI IS IRRELEVANT TO THE ISSUE BEFORE THE COURT.

Mr. Van Gorder died from a personal injury - a fractured skull - upon falling from a scaffold at work.[1] Yet, his injury was not found to "arise out of" his employment. Mr. Ledbetter met a similar fate and result.[2] Mr. Van Gorder and Mr. Ledbetter would have recovered if the extent of the "arising out of" inquiry was as limited as that advocated by the instant plaintiffs. Under their analysis, neither Mr. Van Gorder nor Mr. Ledbetter was seeking benefits for the aggravation of their epilepsy or seizure problem but rather for their "personal injur[ies]" *i.e.*, their fractured skulls. Since they both fractured their skulls while performing work, they recover because the focus is solely on the "personal injury" alleged - the fractured skulls. The fact that the fractured skulls resulted from a fall "set in motion" by a non-work-related problem is irrelevant under this view (plaintiff-Frazzini's brief, p 10). It is irrelevant because the "arising out of" inquiry should not inquire into the cause of the fall.

This argument is wrong because the "arising out of" inquiry does no stop where plaintiffs would have it stop. The "arising out of " inquiry in *Van Gorder*, *Ledbetter*, and the cases before the Court, goes deeper. These are cases where plaintiffs seek recoveries not for the aggravation of a pre-existing, non-work-related problem, but for injuries sustained at the workplace merely as a consequence of a non-work-related problem striking them at work.

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[1] *Van Gorder v Packard Motorcar Co*, 195 Mich 588, 589-590; 162 NW 107 (1917).
[2] *Ledbetter v Michigan Carton Co*, 74 Mich App 330, 332; 253 NW2d 753 (1977).

Where workers' compensation recovery is sought for such "consequential injuries" the arising out of inquiry examines what set in motion the chain of events leading to the fall or, as in the instant cases, the collisions. "Arising" means "starting into action," "originating from," and necessitates an inquiry into whether X "happens as a result of" Y.[3] Mr. Van Gorder and Mr. Ledbetter's fractured skulls did not arise out of the workplace, although their heads hit the concrete floors at work while working, because their falls "originated from" non-work-related seizures. Their injuries "happened as a result of" the seizures. The "arising out of" requirement demands inquiry into *why* Mr. Van Gorder and Mr. Ledbetter fell. There is a chain of causation in such consequential injury cases. The origin of the chain must be considered not just the last link.

On another point, if this Court should accept what *Ledbetter* allows, *i.e.*, recovery if it can be said "with certainty that had the fall occurred at a different location, away from the employer's premises, the injuries would have been less serious,"[4] then the following point is relevant. *Ledbetter*'s exception to *Van Gorder* requires contrasting risks at the workplace with non-workplace risks because only then can one determine "with certainty" whether the injury at work is more serious than what it would have been otherwise. This comparison of work and everyday risks is an analysis only necessary where injuries at work originate from a completely independent, non-work-related problem, such as in the cases now before the Court. By contrast, where a person with a pre-existing back condition who lifts something at work and strains his back, then he has sustained an injury that "arises out of" the employment because the personal injury (the strain) is not a consequence of an independent non-work-related problem with work merely providing the situs for such injury. The work strain in this scenario actually initiated the

[3] Definitions of "arise" per the citations in the instant defendants' primary brief at p 10.
[4] *Ledbetter* at 337.

problem for which the employee seeks benefits, the escalated back problem. It is important to appreciate this point to understand that defendants' argument does no harm to the principle that the employer takes its employees as it finds them and is responsible for aggravation of the employee's pre-existing problem. A distinction should be recognized here between recovery for work aggravation of a pre-existing problem and recovery for consequential injuries, *i.e.*, injuries occurring at the workplace simply because the employee is stricken with an unrelated problem during work hours.

A final point is plaintiff-Frazzini discussion of "accident" in workers' compensation law. Plaintiff-Frazzini urges that *Van Gorder* is not good law because in the early part of the last century the notion of "accident" had been incorporated into the requirements for recovery in workers' compensation. There is a superficial attraction to this argument because it is true to some degree. However, it has no bearing on the instant controversy.

There had been, especially in the 1950's, a great debate about whether the words "personal injury" in the coverage formula: "personal injury arising out of and in the course of employment" contemplated recovery only for *accidental* personal injuries. *E.g. Sheppard v Michigan National Bank*, 348 Mich 577; 83 NW2d 614 (1957). By way of example, where a person strained to lift something at work, it was debated whether such an injury constituted a personal injury because no "accident" occurred in the traditional sense of the word, *e.g.*, there was no slip and fall, there was no malfunctioning of a machine, *etc.* The word "accident" had never appeared in the coverage formula itself but it had once appeared elsewhere, for example in the title to the workers' compensation statute. There were therefore decisions that incorporated an "accident" requirement into the personal injury requirement within the coverage formula.

Case law and legislative changes have since eliminated such "accident" requirement and now recovery follows even in the absence of an accidental cause.

This debate over whether an "accident" is required had no relevance to *Van Gorder*, however, and has no relevance to the issue presented here. Any fair reading of *Van Gorder* illustrates that the issue there was not whether an "accident" occurred but whether the injury "arose out of" employment. In fact, an accident *did* occur in *Van Gorder*. Mr. Van Gorder fell from a scaffold. Therefore, Mr. Van Gorder would have met any "accident" requirement. The notion of "accident" had nothing to do with why Mr. Van Gorder was denied benefits. The point of controversy was instead:

> We therefore pass to the controlling question in this case, viz.: Did the injury arise out of the employment? *Van Gorder*, *supra* at 591.
>
> * * *
>
> But our statute requires something further: the injury must arise "*out of*" the employment, and it is not sufficient that it arose during the employment, if it arose out of something else. *Id.* at 594 (italics in original).

The irrelevance of an accident discussion to the instant case can best be illustrated by this: the instant plaintiffs meet the more demanding (and now defunct) accident requirement and, thus, satisfy the most demanding articulation of that standard because they were involved in automobile *accidents*. The question before the Court is not whether these employees sustained personal injuries or accidental personal injuries. The question before the Court is whether those injuries "arose out of" the employment or "arose out of" their diabetic seizures.

RELIEF

WHEREFORE, defendants-appellants, Faircloth Manufacturing Company and Accident Fund Company, respectfully request that the Supreme Court reverse the decision of the Court of Appeals and reinstate the order of the Worker's Compensation Appellate Commission. Alternatively, the Court should remand to the Commission.

Respectfully submitted,

LACEY & JONES

BY: _____
GERALD M. MARCINKOSKI P32165
Attorneys for Defendants-Appellants
600 S. Adams Road, Suite 300
Birmingham, MI 48009-6827
(248) 433-1414

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